STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 27, 2003
v	No. 239343 Wayne Circuit Court
GERALD MILLER, Defendant-Appellant.	LC No. 01-004099-01

Before: Cooper, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv). He was sentenced to 2 ½ to 20 years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court improperly coerced the jurors to return a unanimous verdict of guilty or not guilty by failing to instruct the jurors that they have an option to disagree and return no verdict. However, the trial court requested that the parties assert "[a]ny additions, amendments or corrections or objections to the jury instructions." Defense counsel responded, "[n]one, your Honor." When defense counsel expresses satisfaction with the proposed and subsequent instructions to the jury, such approval constitutes a waiver that extinguishes any error regarding the instructions. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Therefore, because defendant waived his rights to challenge the trial court's allegedly coercive jury instruction, there is no error to review.

Regardless, in *People v Pollick*, 448 Mich 376, 381-383, 386; 531 NW2d 159 (1995), our Supreme Court addressed this issue and held that a trial court is obligated only to instruct the jury pursuant to CJI2d 3.11, which provides sufficient instruction to jurors in the event that they fail to agree on a verdict. Here, the trial court instructed the jury pursuant to CJI2d 3.11; thus, there was no error. Moreover, the instruction given to the jury predicated on CJI2d 3.17 was not coercive. It did not cause the jurors to abandon conscientious opinion for the sake of reaching a unanimous agreement, especially where the trial court first instructed the jury under CJI2d 3.11. Reading the instructions as a whole, *People v Kris Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001), the jurors were not coerced into believing that they were required to agree. Rather, if they agreed, the only two options were acquittal or a finding of guilt.

Defendant next argues that the trial court improperly diminished the prosecution's burden of proof by erroneously instructing the jury regarding the notion of proof beyond a reasonable doubt. Because defendant failed to object at trial, our review of the issue is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 761-763; 597 NW2d 130 (1999).

Jury instructions are read as a whole rather than extracted piecemeal to establish error. *Aldrich*, *supra* at 124. The reviewing court must balance the general correct, clear tenor of the instructions in their entirety against the potentially misleading effect of a single isolated sentence. *People v Freedland*, 178 Mich App 761, 766; 444 NW2d 250 (1989). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Aldrich*, *supra* at 124.

Defendant first cites to a statement made by the trial court during voir dire:[1]

> If after listening to all of the evidence, you don't have a reasonable doubt about the guilt of the defendant of the crime, it would be your duty to find the defendant guilty.

Defendant argues that this statement improperly implied that the jurors should begin deliberation assuming that defendant was guilty. However, viewing the trial court's instructions as a whole, this single isolated sentence did not communicate to jurors that they should begin deliberation assuming defendant is guilty. Shortly before the trial court gave the challenged instruction, it stated:

> The presumption of innocence is based, ladies and gentleman, on a legal policy or actually a legal and political policy that this country formed hundreds of years ago, and it stands for the premise if someone is accused of committing a crime, the person who is accused of committing that crime doesn't have to prove that they didn't do it. It's up to the Government to prove that they did it.

The trial court then explained the implications of the presumption of innocence.

> [S]ince the defendant doesn't have to prove that he didn't do it, it really means as a practical consequence Mr. Miller, the defendant, doesn't have to prove anything in this case.
>
> In fact, the only thing that Mr. Miller is required to do is not to be disruptive of the trial proceedings.

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[1] These statements made by the trial court were not part of the court's general instructions directly prior to the taking of evidence or after the presentation of proofs. Rather, the statements were made in the middle of jury voir dire, where the court was explaining some basic legal concepts of our criminal jurisprudence. We find it appropriate to treat the trial court's statements as comparable to any later instructions given by the court.

We find that the trial court fairly presented the jurors with an understanding of defendant's right to be presumed innocent. Since the instructions sufficiently protected defendant's rights, there is no error. *Aldrich, supra* at 124.

Defendant then argues that the following jury instruction improperly conveyed the notion of reasonable doubt:

> Now every person accused of crime is presumed to be innocent. This means that you must start with the presumption that the defendant is innocent. This presumption continues throughout the trial and entitles the defendant to a verdict of not guilty unless you are satisfied beyond a reasonable doubt that the defendant is guilty.

Defendant argues that the use of the term "satisfied" is inconsistent with the principle that jurors, "having considered all of the evidence presented in the case, have found proven beyond a reasonable doubt each and every fact necessary to constitute the crime of which the defendant is charged." However, the trial court instructed the jury pursuant to CJI2d 3.2. This Court has determined that CJI2d 3.2 presents an adequate instruction regarding the concept of reasonable doubt. *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999). Therefore, there was no error in instructing the jury under CJI2d 3.2.

Defendant next argues that the prosecution improperly vouched for the truthfulness of witnesses. Because defendant failed to object to the prosecutor's comments, review of defendant's claim is for plain error affecting substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

A prosecutor may not vouch for the credibility of a witness to the effect that he has some special knowledge that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). However, a prosecutor may argue from the facts that the defendant or another witness is not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

It is clear from the comments that the prosecution did not convey to the jury that it had some special knowledge that the witness was testifying truthfully which was unknown to the jury. *Bahoda, supra* at 276. Rather, the prosecutor's comments reflected a reasonable perspective of the police officers' trial testimony. Six police officers testified at defendant's trial concerning the raid on the house. From the prosecution's perspective, each police officer's testimony supported one another's, and contributed to the credibility of each police officer individually. Thus, the prosecution argued that the police officers' testimony was credible not through special knowledge that the witness was testifying truthfully, but from inferences that the jury may have drawn regarding the testimony of the police officers at trial.

Also, defendant testified that the police officers allegedly told him, "[w]hatever we find in this safe, we're going to put on you." Defendant testified that he was at the house to repair or replace the kitchen sink and that when the police executed the warrant, he was on the second floor. However, the police officers testified that defendant was on the first floor when the raid began. In response to defendant's testimony, the prosecution maintained that the police officers should be believed, and that defendant should not be believed. As noted above, a prosecutor

may argue from the facts that the defendant or another witness is not worthy of belief. *Launsburry, supra* at 361. Therefore, because the prosecution did not convey to the jury special knowledge that the witnesses were testifying truthfully, and the defendant's testimony challenged the police officers' credibility, the prosecution's statements were proper. Accordingly, there is no error affecting defendant's substantial rights. *Carines, supra* at 763.

Defendant next argues that the prosecution urged the jury to apply erroneous legal criteria to determine whether defendant was guilty of aiding and abetting another with the possession with intent to deliver less than fifty grams of cocaine. Again, because defendant failed to object to the prosecutor's comments, review of defendant's claim is for plain error affecting substantial rights. *Schutte, supra* at 720.

A prosecutor's clear misstatement of the law, if uncorrected, can deprive a defendant of a fair trial. *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). During closing argument, the prosecution stated:

> Remember the elements of aiding and abetting. They are as follows. First, that the alleged crime was actually committed by the defendant or someone else. Secondly, that before or during the commission of the crime, the defendant, Mr. Miller, did something to assist in the commission of the crime. Lastly, at the time he gave assistance, he intended to help commit the crime.

Defendant specifically contends that the prosecutor's statement above, "that the alleged crime was actually committed by the defendant or someone else," was a misstatement of the law. The affect of this statement, defendant argues, led jurors to believe that defendant was aiding and abetting himself, which relieved the prosecution of proving the guilt of someone other than defendant who committed the crime.

However, we find that the prosecution did not misstate the law. In *Carines, supra* at 757, the Supreme Court, quoting *People v Turner*, 213 Mich App 558, 568-569; 540 NW2d 728 (1995), partially overruled on other grounds, *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001), stated:

> To support a finding that a defendant aided and abetted a crime, the prosecutor must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement.

The prosecution's statement of the law accurately recites *Carines*. There is no error.

Defendant argues that the prosecution failed to present sufficient evidence that he aided and abetted another with the possession and intent to deliver less than fifty grams of cocaine. When a defendant challenges the sufficiency of the evidence in a criminal case, this Court considers whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror in finding guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000); see also *People v Wolfe*, 440 Mich 508, 515-516; 489

NW2d 748 (1992), amended 441 Mich 1201 (1992). Here, the jury was instructed that defendant could be found guilty of possession with intent to deliver cocaine if he either directly committed the crime or aided and abetted in its commission. The jury returned a verdict of guilty, but did not specify on which of the two theories its decision was based.

The crime of possession with intent to deliver cocaine requires that "the defendant must have knowingly possessed a controlled substance, intended to deliver that substance to someone else, and the substance possessed must have actually been cocaine and defendant must have known it was cocaine." *People v Johnson*, 466 Mich 491, 499-500; 647 NW2d 480 (2002). Actual physical possession of the cocaine is unnecessary to support such a conviction; "constructive possession will suffice." *Id.* at 500. Constructive possession exists "when the totality of the circumstances indicates a sufficient nexus between defendant and the contraband." *Id.* In this regard, "[t]he essential question is whether the defendant had dominion or control over the controlled substance." *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995).

Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that defendant possessed cocaine with the intent to deliver. Though no cocaine was found on defendant' s person, the jury could find beyond a reasonable doubt that defendant constructively possessed the cocaine found on the table near the side door. Defendant was seen earlier selling cocaine out of the side door before the raid. When the police raided the house, defendant was heard running upstairs. He was found short of breath and sweaty on the second floor of the house. Given that the cocaine was packaged for distribution, a portable scale was in the house, and large amounts of cash were inside a safe, a rational jury could find beyond a reasonable doubt that defendant constructively possessed the cocaine and intended to deliver it.

With respect to aiding and abetting, we have already cited above the necessary elements to support a conviction under this theory. *Carines*, *supra* at 757. An aider and abettor must have the same requisite intent as that required of a principal. *People v Barrera*, 451 Mich 261, 294; 547 NW2d 280 (1996). To sustain an aiding and abetting charge, the guilt of the principal must be shown, but the principal need not be convicted. *Turner*, *supra* at 569. "Rather, the prosecutor need only introduce sufficient evidence that the crime was committed and that the defendant committed it or aided and abetted it." *Id*., citing *In re McDaniel*, 186 Mich App 696, 699-700; 465 NW2d 51 (1991).

For the reasons discussed, *supra*, the jury could have first found that either defendant had possession of cocaine with intent to deliver or that he associated with the other person that was seen selling cocaine in the house before the raid. Second, evidence was presented that defendant was selling the cocaine, which raises the inference that defendant was one of the "salesmen." Third, the jury could rationally find that defendant intended to commit the crime charged or had knowledge that the "salesman" intended to commit the crime charged because defendant was seen earlier selling cocaine out of the same side door as the other "salesman." Therefore, either as the principal or as an aider and abetter, a rational jury could find beyond a reasonable doubt that defendant was guilty.[2]

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[2] Also lacking merit is defendant's additional argument that the prosecutor failed to present the (continued…)

Defendant's final claim is that his trial counsel's failures to object denied him effective assistance of counsel. We disagree. Defendant's claims of ineffective assistance concern each of the issues already rejected by us in this opinion, except of course the issue of sufficiency of the evidence. The jury instructions regarding reasonable doubt, the instructions related to choice of verdict, the prosecutor's remarks to the jury, and the prosecutor's statements concerning aiding and abetting, were all proper. "Counsel is not obligated to make futile objections." *People v Meadows*, 175 Mich App 355, 362; 437 NW2d 405 (1989). Therefore, the claim of ineffective assistance of counsel is rejected.

Affirmed.

/s/ Jessica R. Cooper
/s/ David H. Sawyer
/s/ William B. Murphy

(…continued)

factual basis of his theory of aiding and abetting to the jury. The prosecutor in closing argument expressly indicated, in part, that defendant was actively working together with another individual in the house who was selling cocaine as established by the surveillance on the home and the raid.